

## CURRENT GUIDANCE

Valid from: 20 September 2023

September 2023

# Guidance on the regulation of non-professional conduct<sup>1</sup>

## Introduction

1. The Bar Standards Board (**BSB**) is the regulator of barristers and other specialised legal services businesses, and their employees and managers, in England and Wales. While this guidance applies to all individuals that we regulate, for ease we refer to “barristers” throughout.
2. The BSB Handbook serves as the key regulatory tool for setting standards for those we regulate. In performing our regulatory functions, we seek to promote the regulatory objectives set out in s1 Legal Services Act 2007. These include:
  - protecting and promoting the public interest;
  - improving access to justice;
  - protecting and promoting the interests of consumers;
  - encouraging an independent, strong, diverse and effective legal profession; and
  - promoting and maintaining adherence to the professional principles (in particular, the requirement to act with integrity).<sup>2</sup>
3. Although our key role is the regulation of barristers’ conduct in the course of their professional activities, the BSB Handbook also sets standards of conduct which apply to barristers at all times (see below). This is because conduct by barristers outside their professional activities can impact on public confidence in them or the profession and can be contrary to the regulatory objectives.
4. This guidance is designed to clarify where we think the boundaries lie in the regulation of conduct that occurs outside the scope of a barrister’s professional life (as a barrister) and gives guidance on the circumstances in which we are likely, in principle, to have a regulatory interest in such conduct. Such conduct might include where a barrister is acting in a professional capacity other than as a barrister. By “regulatory interest” we

<sup>1</sup> We use the term “non-professional conduct” to capture conduct that does not occur during a barrister’s professional activities (as a barrister). This includes conduct that occurs in a personal/private capacity, as well as conduct that occurs in other professional capacities (not as a barrister).

<sup>2</sup> In discharging our regulatory functions, the BSB has a duty under s28 Legal Services Act 2007 to act, so far as is reasonably practicable, in a way which is compatible with, and which is most appropriate for the purpose of meeting, the regulatory objectives.

mean the circumstances in which the BSB, as a regulator of the profession, may have a legitimate concern about conduct which has the potential to engage provisions of the BSB Handbook and which is suitable for further consideration in accordance with our processes. This might include, for example, undertaking an initial risk assessment to inform whether a matter is suitable for onward referral for supervision activity or enforcement action.

5. **Having a regulatory interest in conduct does not mean that regulatory action will necessarily follow.** As a risk-based and proportionate regulator, we focus our resources on cases that pose the most risk of harm to the regulatory objectives. In all cases, we will be guided by the statutory regulatory objectives, human rights considerations, and relevant case law.
6. Please note that where case studies are used in this document, they are used for illustrative purposes only. Whether or not such or similar conduct engages our regulatory interest or amounts to a potential breach of the BSB Handbook depends on a close analysis of the particular facts on a case-by-case basis.

### **Human Rights Act 1998**

7. We recognise that our regulation of the profession needs to strike the right balance between the public interest in preserving public confidence in the profession and individual barristers, and a barrister's rights which are guaranteed under the Human Rights Act 1998 and the European Convention on Human Rights (ECHR).
8. We also recognise that our regulation of non-professional conduct is likely to engage a barrister's rights under Article 8 (the right to respect for private and family life, home and correspondence).
9. In some cases, Article 10 (the right to freedom of expression) may also be engaged where reported conduct involves the barrister exercising their right to express themselves, for example, by expressing their views on social media (although Article 10 may be engaged in relation to conduct in professional life as well).
10. Article 8 and Article 10 are both qualified rights, which means we may take regulatory action in circumstances where a barrister's conduct is potentially in breach of the standards set out in the BSB Handbook and such action can be justified.

11. For example, Article 10 may protect a barrister’s right to hold and express an opinion, but the manner in which it is expressed could be a potential breach of the BSB Handbook and therefore we may have a regulatory interest in it.
12. Other qualified rights may also be engaged in particular cases, such as Article 9 (the right to freedom of thought, conscience and religion) or Article 11 (the right to freedom of assembly and association).
13. In deciding whether we have a regulatory interest in a matter (and, if so, what, if any, action should be taken) we will undertake a careful balancing exercise on a case-by-case basis to determine whether any regulatory action that may interfere with a barrister’s human rights can be justified.

### **General Principles**

14. Barristers are central to the effective operation of the legal system, and it is important that our regulation serves to maintain public trust and confidence in them as individual practitioners, and in the profession as a whole.
15. While barristers cannot be held to unreasonably high standards and are not to be viewed as “paragons of virtue”, barristers are nevertheless held to a higher standard of conduct than ordinary members of the public.
16. Members of the public must feel able to access an independent, strong, diverse, and effective profession. This means we have an important role in ensuring that any member of the profession, whether practising or unregistered, acts in a way that maintains public trust and confidence in the profession.
17. When a barrister’s conduct in their non-professional life is incompatible with the high standards the public expects of them, we may take regulatory action in the public interest. This approach has long been recognised by the courts.<sup>3</sup>
18. The case law is clear that the closer non-professional conduct is to professional practice, the greater the justification for regulatory action is likely to be. We are of the view that the closer any non-professional conduct is to a barrister’s professional activities, workplace or relationships and/or the more it reflects how they might behave in a professional context, the more likely we are to have a regulatory interest in it.

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<sup>3</sup> See, for example, *R (on the application of Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 (Admin), *Khan v Bar Standards Board* [2018] EWHC 2184 (Admin), *Ryan Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin), and *AB v Bar Standards Board* [2020] EWHC 3285 (Admin).

However, we may also have a regulatory interest where the nature of the conduct is so serious that it is capable of diminishing public trust and confidence in the barrister or the profession, regardless of the context and environment.

19. We are unlikely to have a regulatory interest where we receive information about conduct in a barrister's personal/private life which has little or no impact on their professional practice, or on public trust and confidence in the profession.

### **Our regulation of non-professional conduct**

20. The Code of Conduct for barristers is contained in Part 2 of the BSB Handbook. The Code of Conduct sets out the standards expected of barristers and includes ten mandatory "Core Duties", supplemented by a range of mandatory "Conduct Rules" and non-mandatory guidance and outcomes. Most of the Core Duties and rules only apply when a barrister is "*practising*"<sup>4</sup> or "otherwise providing *legal services*".<sup>5</sup>
21. The term "*practising*" is broadly defined in the BSB Handbook. It means all activities, including the business-related activities, of a practising barrister. This means that chambers-related events, for example, are likely to be treated as being part of a barrister's professional life,<sup>6</sup> so conduct during such events engages all the Core Duties and rules that apply to practising barristers.
22. If an unregistered barrister practises as a barrister in accordance with rS9 of Part 3 of the BSB Handbook (the Scope of Practice Rules) (ie if they supply, or offer to supply, legal services and hold themselves out as a barrister) then the Core Duties and rules which apply to practising barristers also apply to them. Unregistered barristers should read our '[Unregistered Barristers Guidance](#)' for more information on how the BSB Handbook applies to them.
23. This guidance on the regulation of non-professional conduct covers the circumstances in which a barrister is not practising (in the broad sense set out above) or otherwise providing legal services. This might include, for example, a barrister's use of social media when it is unrelated to their work, or their conduct during personal litigation. Barristers should also read our '[Social Media Guidance](#)' for more information about how

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<sup>4</sup> The rules governing when a barrister (including an unregistered barrister) is deemed to be "practising" as such can be found at rS9 and rS10 of the Scope of Practice Rules at Part 3 of the BSB Handbook.

<sup>5</sup> See the "application" provisions at Section A of the Code of Conduct. The definition of "legal services" is in Part 6 of the BSB Handbook.

<sup>6</sup> See [Howd v Bar Standards Board](#) [2017] EWHC 210 (Admin).

we will consider conduct that has occurred on social media (both in a professional and non-professional context).

24. Of the Core Duties and mandatory rules that apply to barristers (including unregistered barristers) at all times, the following are most likely to be relevant to non-professional conduct:

**Core Duty 5 (CD5)**

*You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.*

**Rule C8 (rC8)**

*You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).*

**Determining whether we have a regulatory interest**

25. It is our aim, as a transparent and risk-based regulator, to ensure that barristers and the public have a clear understanding of the standards expected of barristers and the circumstances in which we might have a regulatory interest in non-professional conduct.

**Criminal conduct**

26. When considering whether we have a regulatory interest in non-professional conduct, the first question we will ask is:

**Has the barrister been:**

- a. Charged with an indictable offence in England and Wales;**
- b. Charged with a criminal offence of comparable seriousness elsewhere; or**
- c. Convicted of, or accepted a caution for, any criminal offence other than a minor criminal offence<sup>7</sup> (subject to the Rehabilitation of Offenders Act 1974 (as amended))?**

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<sup>7</sup> "Minor criminal offence" is defined at Part 6 of the BSB Handbook and includes:

- a) an offence committed in the United Kingdom which is a fixed-penalty offence under the Road Traffic Offenders Act 1988;
- b) an offence committed in the United Kingdom or abroad which is dealt with by a procedure substantially similar to that for such a fixed-penalty offence;
- c) an offence whose main ingredient is the unlawful parking of a motor vehicle.

27. A barrister could be the subject of criminal charges and ultimately a criminal conviction (or caution). Such charges, cautions or convictions may arise from their non-professional life (for example, a conviction for drink driving or harassment in a domestic context), but they could also be associated with their professional life (for example, convictions for a failure to pay tax or VAT in relation to their practice).
28. It is not our role to make a finding as to whether a barrister has committed a criminal offence; this is the responsibility of the criminal justice system. However, we take the view that it is incompatible with the high standards expected of the profession for barristers to engage in criminal conduct. This is because we consider it to be important that all barristers, both practising and unregistered, are (and are seen to be) rule-abiding citizens in order to maintain public trust and confidence in them and in the profession. Engaging in criminal conduct is likely to be inconsistent with CD5 and rC8.
29. Barristers have a duty to report promptly certain types of criminal conduct (but not “*minor criminal offences*”) to us by virtue of rC65.1 and rC65.2 of the BSB Handbook. This obligation applies at all times to both practising and unregistered barristers. The first question we will ask (above) when deciding whether we have a regulatory interest in a barrister’s non-professional conduct therefore reflects this duty to self-report. A failure to report promptly is, in itself, a breach of the BSB Handbook that could attract enforcement action.
30. However, the fact that we may have a regulatory interest in a charge for an indictable offence does not mean we will necessarily take regulatory action prior to a conviction. What action we do take will depend on all the circumstances of the case, including the nature of the alleged offence, the barrister’s area of practice, and the risk posed.

### **Case Study 1**

We receive a report from a barrister who has been given a fixed-penalty notice for failing to wear a seatbelt while driving.

As this is a fixed-penalty offence under the Road Traffic Offenders Act 1988 and therefore a “*minor criminal offence*” (as defined in the BSB Handbook) it is unlikely that we would have a regulatory interest in this conduct.

### Case Study 2

We receive a report that a barrister (**B**) was charged with causing death by dangerous driving while on a family holiday.

B has allegedly committed an indictable offence, which is a serious criminal offence. We take the view that it is incompatible with the high standards expected of the profession for barristers to engage in criminal conduct, because we consider it to be important that all barristers, both practising and unregistered, are (and are seen to be) law-abiding citizens in order to maintain public trust and confidence in them and in the profession. Engaging in criminal conduct is therefore likely to be inconsistent with **CD5** and **rC8**: as such, we are likely to have a regulatory interest in B's conduct.

In this case, B has only been charged with, and not convicted of, the criminal offence; it is possible that B may be acquitted at the conclusion of the criminal process. We might therefore put any assessment of potential breaches on hold, pending the conclusion of the underlying criminal proceedings. However, if the charge gives rise to particular concerns (for example, if the barrister is a risk to the public or clients), we may consider taking interim action to suspend them pursuant to our powers in the Interim Suspension and Disqualification Regulations (Part 5C of the BSB Handbook).

If B had been charged with a similar offence in another jurisdiction (for example, in Scotland), we would likely still have a regulatory interest if the criminal offence was of comparable seriousness to an indictable offence in England and Wales.

31. There may be circumstances where barristers engage in conduct which could constitute a criminal offence but, for various reasons, the conduct is not reported to the police, or it has been reported but the barrister has not been charged or criminal conduct is not proved. We may nevertheless have a regulatory interest in such conduct, but it will be considered in line with the principles applicable to "other conduct" below.

### **Other conduct**

32. If the conduct reported to us does not fall within the scope of the principles relating to criminal conduct above, then when considering whether we have a regulatory interest in relation to any other conduct, the second question we will ask is:

**Is the conduct sufficiently relevant or connected to the practice or standing of the profession such that:**

- a. it is likely to diminish public trust and confidence in the barrister or the profession; and/or**
- b. it could reasonably be seen by the public to undermine the barrister's honesty, integrity or independence?**

**In determining whether the conduct is sufficiently relevant or connected to the practice or standing of the profession, we will take into account:**

- i. the nature of the alleged conduct; and**
  - ii. the context and environment in which the conduct is said to have occurred.**
33. This is a question that requires careful assessment according to the particular facts and circumstances of each case. It is not possible to set a firm line between the types of conduct in which we will or will not have a regulatory interest.

### Case Study 3

We receive a report about a barrister's (**B**) failure to repay a substantial loan provided by a friend (**F**), and there is evidence to show that B had agreed to repay the loan on a number of occasions. In this case, there is no evidence that B has acted dishonestly. The loan has no relevance to B's professional practice.

A dispute about a private financial arrangement is unlikely to be sufficiently relevant or connected to the practice or standing of the profession and therefore we are unlikely to have a regulatory interest in this conduct.

However, we may take a regulatory interest in B's conduct if a judgment/order has been obtained by F in relation to the debt and B failed to pay the debt in accordance with that order. In those circumstances, B would be in breach of an order of the court, and although it would very much depend on the reasons for this breach, B's conduct may potentially engage **CD5** and/or **rC8**.

Whether or not action would be taken in relation to such conduct would depend on the reasons for B's non-compliance, including their means to pay. We are more likely to have a regulatory interest where the issues have been explored during a civil hearing in relation to the debt, and B has simply ignored the final order, or where B has exhausted the appeal process and still refuses to comply with the order.

#### *The Nature of the Alleged Conduct*

34. When considering the nature of the conduct, we will look at what the barrister has allegedly done and its impact on the relevant Core Duties and Conduct Rules in the BSB Handbook. A non-exhaustive list of the types of conduct which are likely to be treated as a breach of CD5 is set out in gC25 (in Part 2 of the BSB Handbook). We may have a regulatory interest in this conduct, even if it occurs in a non-professional context, and this includes conduct which is seriously offensive<sup>8</sup> towards others or conduct which is dishonest, discriminatory, victimising or harassing.
35. We may have a regulatory interest in conduct which is discriminatory, for example, because conduct which demonstrates a barrister's attitude towards people from certain groups (particularly minoritised and/or vulnerable groups) might indicate how they will

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<sup>8</sup> Whether conduct is "seriously offensive" is determined objectively by reference to how reasonable members of the public would perceive the conduct.

interact with people from that group in the future, including how they may provide legal services to them. Such conduct might also alienate clients, future clients, and members of the public who identify as members of that group. This may make them feel uncertain about engaging with the barrister and/or the profession or trusting that the barrister and/or the profession will act in their best interests. This could be seen as a risk to access to justice, and it is therefore likely to be in the public interest to regulate such conduct.

#### **Case Study 4**

We receive a report about a barrister (**B**) who has posted a series of comments in a private Facebook group (consisting of around 50 members) which referred to physical violence and violent sexual fantasies about a female member of the public (**P**), and used derogatory sexist slurs targeted at her.

The posting of violent, sexual and derogatory content on social media is serious conduct that is likely to be sufficiently relevant or connected to the standing of the profession such that **CD5** and/or **rC8** might be engaged. The fact that B's conduct is only visible to a limited audience does not prevent the conduct potentially diminishing the public trust and confidence in B or the profession or potentially being seen by the public to undermine B's integrity. As such, we are likely to have a regulatory interest in this conduct.

However, as the conduct occurred on social media, we would also have regard to our 'Social Media Guidance' and B's Article 8 and Article 10 rights before making a decision on whether regulatory action is appropriate.

#### *The Context and Environment*

36. The closer the link between the context and/or environment in which the conduct occurred and that of the profession, the greater the likelihood that we will have a regulatory interest in it.
37. This means, for example, that conduct by a barrister involved in private litigation may well be of regulatory interest to us if, for example, a barrister engages in vexatious behaviour that wastes the court's time or fails to comply with court orders.

### Case Study 5

We receive a report about a barrister (**B**), who had been a party to family law proceedings in their personal capacity, deliberately giving untruthful evidence to the court. B has not been charged with contempt of court or a separate criminal offence.

Bearing in mind the dishonest and misleading nature of the alleged conduct, and the fact that dishonesty is a serious matter for a legal professional, and taking into account that the alleged conduct occurred in the context of court proceedings, it is likely that B's alleged conduct is sufficiently relevant or connected to the practice or standing of the profession such that **CD5** and/or **rC8** might be engaged. As such, we are likely to have a regulatory interest in this conduct.

38. Whilst the ability to identify somebody as a barrister is not a necessary ingredient for us to have a regulatory interest in non-professional conduct, it is likely to strengthen the link between the conduct and the profession. This is because, by virtue of being identifiable as a barrister, there may be a greater risk of the conduct diminishing public trust and confidence in the barrister or in the profession. This is also likely to include situations in which a barrister uses their status as a barrister to obtain an advantage or to the detriment of others.
39. However, we may also have a regulatory interest in conduct that is so serious that it is capable of diminishing public trust and confidence in the barrister or the profession, regardless of the context and environment, for example, discrimination.

### Case Study 6

We receive a report about a barrister (**B**) who sexually assaulted another person (**A**) while at a nightclub after work hours. The alleged conduct was witnessed by various people, including staff working at the nightclub, who eventually removed B from the premises. Whilst A reported the matter to us, A did not report the matter to the police. B has not been charged with a criminal offence; however, the evidence provided with the report shows that the nature of B's alleged conduct may have been capable of amounting to a sexual assault contrary to s3 Sexual Offences Act 2003 (this offence would not fall into the definition of a "*minor criminal offence*").

Whilst the alleged conduct occurred outside of the barrister's practice (ie in a nightclub, after work hours, and not involving other members of the Bar), the nature of the alleged conduct is so serious, and may have amounted to sexual assault or harassment, that it is likely to be sufficiently relevant or connected to the standing of the profession, regardless of the context in which it occurred, such that **CD5** and/or **rC8** might be engaged. We are therefore likely to have a regulatory interest in this conduct.

### Case Study 7

We receive a report from a member of the public about a barrister (**B**) who was involved in a climate change protest. The report described how B had been arrested on suspicion of aggravated trespass after climbing a tree in a bid to stop it from being cut down (where the local authority had issued a permit for the tree to be cut down). It is clear from the report and from coverage of the issue in the press that B had identified their professional status during the protest and was therefore recognisable as a barrister. However, notwithstanding the arrest, B was not ultimately charged with (or convicted of) a criminal offence.

Bearing in mind the nature of B's conduct (climbing a tree as part of a political protest) which occurred in the context of B exercising their Article 10 and Article 11 rights, it is unlikely that B's conduct is sufficiently relevant or connected to the standing of the profession and we are unlikely to have a regulatory interest in this conduct.